

Michigan Law Review


Volume 96 | Issue 7

1998

Reply: Did the Fourteenth Amendment Repeal the First?

Jed Rubinfeld
Yale Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

 Part of the [First Amendment Commons](#), [Fourteenth Amendment Commons](#), [Legislation Commons](#), [Religion Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Jed Rubinfeld, *Reply: Did the Fourteenth Amendment Repeal the First?*, 96 MICH. L. REV. 2140 (1998).
Available at: <https://repository.law.umich.edu/mlr/vol96/iss7/7>

This Correspondence is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

DID THE FOURTEENTH AMENDMENT REPEAL THE FIRST?

*Jed Rubenfeld**

To get right to the point: Mr. Hacker does not disagree that the Establishment Clause would, in the absence of the Fourteenth Amendment, have prohibited Congress from passing a nationwide religion law like RFRA. He believes, however, that the Fourteenth Amendment has in part repealed the First.

Of course, he doesn't want to say *repealed*. The language of repeal is not pleasant to the ears of those who would like to forget about First Amendment antidisestablishmentarianism. The Fourteenth Amendment did not "repeal any aspect of the text of the [Establishment] Clause," Hacker says, but only "change[d] profoundly the *meaning* of [its] words."¹ If, however, statute *A* means *x* and *y*, and statute *B* (enacted later) provides "*x* shall no longer be the law of the land," it makes no difference whether we say that *B* partially repealed *A* or merely "changed profoundly the meaning of [its] words."² If, moreover, *B* does *not* expressly provide that *x* shall no longer be the law of the land — if, rather, there is merely a debated question of whether *B* should be so interpreted — then the question, for good or ill, is whether to read *B* as having partially repealed *A*.

Dodging the word *repeal*, in other words, does not alter the question. No one had ever supposed that the Fourteenth Amendment rescinded any of the foundational prohibitions laid upon Congress in the First through Eighth Amendments. Until now — for this is just what Mr. Hacker says the Fourteenth Amendment did. Of course, it is possible to read the Fourteenth Amendment this way, but Mr. Hacker's arguments in defense of this position would have been far stronger if he had better appreciated the principles of religious liberty underlying — both in 1789 and in the present day — the Establishment Clause.

* Professor, Yale Law School. A.B. 1980, Princeton; J.D. 1986, Harvard. — Ed.

1. Jonathan D. Hacker, *A Response to Professor Rubenfeld*, 96 MICH. L. REV. 2129, 2137 (1998).

2. See *id.*

I. ANTIDISESTABLISHMENTARIANISM THEN

The basic premise of Mr. Hacker's argument is an injustice he does to the First Amendment. As to the twofold core meaning of the Establishment Clause, there is no serious disagreement. The Clause prevented Congress both from establishing a national religion and from interfering with certain local religion laws, defended by their champions in the name of religious freedom but condemned by their detractors as establishments.³ The paradigm case here was the ecclesiastical system common throughout New England, where each town was permitted to install by majority vote a Protestant ministry to be supported by tax revenues (with exemptions provided for some dissidents).⁴ This second aspect of the Establishment Clause, prohibiting Congress from interfering with local pro-religion laws, is its *antidisestablishmentarian* component.

Mr. Hacker evidently derived from the historical sections of my article a very disparaging view of First Amendment *antidisestablishmentarianism*. He does not see in it any principle, not even a debatable principle, of religious liberty. Instead, the Establishment Clause, in its *antidisestablishmentarian* aspect, was merely a "sop thrown to" the unprincipled New England states.⁵ "[A]ntidisestablishmentarianism became part of the First Amendment as a result of parochial Realpolitik and not a debate over the meaning and content of religious liberty."⁶

Now, if we are dealing with a mere "sop," with mere "*parochial realpolitik*," then of course we know in advance how a court should decide whether the Fourteenth Amendment repealed First Amendment *antidisestablishmentarianism*. For if the battle is between America's constitutional principles of religious liberty on the one hand and mere politicians on the other, who can doubt the outcome?

But this "parochial" view of the Establishment Clause is pure anachronism. Today, of course, the New England system seems scandalous. How can it be that New England, the very birthplace of American religious liberty, had in 1789 laws that strike us as obvious and reprehensible establishments of religion? We are not taught about such laws. We are not taught that the First Amendment was centrally intended to protect them. We know nothing

3. For a fuller discussion, see Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2351-56 (1997).

4. See *id.* at 2352-54.

5. Hacker, *supra* note 1, at 2132.

6. *Id.* at 2135.

about First Amendment antidisestablishmentarianism, and when we first hear of it, our instinct is to find it unprincipled, of no present use or value, and certainly no part of the present Constitution.

But it does great injustice to our history and to the Constitution itself to try to sever First Amendment antidisestablishmentarianism from America's "debate over the meaning and content of religious liberty."⁷ Religious tyranny, for early Americans, was exemplified by the Church of England — or more ghastly still, by Popery — in which a central government dictated to everyone the terms of Christian worship. New Englanders had fought against the Church at tremendous cost, and what they had fought for was the right of a community of protesting believers to live by their own lights.

The word *community* is central here. For many Americans today, religious freedom is a wholly individual matter, an affair of private conscience. But New Englanders had fought bitterly for the right of religious communities to flourish freely, for the right of communities of believers to decide for themselves how to worship God without being subject to the religious dictates of a centralized government. (Think of the Amish for a contemporary example.) This was the "meaning and content" of the town-by-town religious system New England maintained. Most New Englanders vigorously denied that this system represented an establishment of religion. They thought of it as the achievement of religious liberty. And they had no intention of giving it up. As John Adams is reported to have said, "We might as well expect a change in the solar syst[e]m, as to expect they would give up their" local-autonomy church system.⁸

First Amendment antidisestablishmentarianism was, therefore, every bit as much a part of the Revolutionary fight for religious freedom as was First Amendment anti-establishmentarianism. The point of First Amendment antidisestablishmentarianism was to prevent the new national government from interfering with local systems of religious liberty that — in their supporters' eyes — did *not* violate free exercise, that did *not* establish religion, but that Congress might seek, following the powerful Virginia legislature,⁹ to abolish.

In this way, prohibiting Congress from violating free exercise, from establishing religion, *and from interfering with local pro-reli-*

7. *Id.* at 2135.

8. ISAAC BACKUS, *Diary 1774*, in 2 THE DIARY OF ISAAC BACKUS 895, 917 (William G. McLoughlin ed., 1979) (quoting John Adams).

9. See Rubinfeld, *supra* note 3, at 2352 n.30 (discussing Jefferson's bill "for Establishing Religious Freedom").

gion laws, the First Amendment effectively guaranteed what the Federalists had said was already implicit in the Constitution: that "[t]here is not a shadow of right in the general government to intermeddle with religion."¹⁰ Actually, this Madisonian formulation was probably too extreme (for in exclusively federal domains — for example, in regulating the sessions of Congress or in prescribing laws for the territories — the Constitution may have left Congress free to support religious practices), but the First Amendment undoubtedly erected a great wall of separation between Congress and religion. This wall of separation was maintained by two different but equally important buttresses: Congress could neither dictate religion directly to individuals nor dictate it indirectly by telling state or local communities what their religion laws would have to be.

RFRA fundamentally breached this wall. It was an effort by Congress to dictate for the entire nation Congress's own definition of the terms of religious neutrality. Did the Fourteenth Amendment empower Congress to do what the First Amendment foundationally forbids? This question cannot be answered by dismissing the Establishment Clause as a "sop," as mere "parochial realpolitik." It can be answered only after recognizing forthrightly that preventing Congress from dictating religion — even if Congress was dictating what it believed to be true religious neutrality — to state and local communities was one of the foundational principles committed to writing in the Bill of Rights. It can be answered only by appreciating the true significance of the Establishment Clause's wall of separation for America's constitutional principles of religious freedom.

II. ANTIDISESTABLISHMENTARIANISM NOW

With these considerations in mind, I do not think we can answer the question the way Mr. Hacker would like. There is, first of all, the very considerable burden of proof that ought to be borne by someone claiming that one of the prohibitions laid upon Congress by the Bill of Rights has been done away with by implication.¹¹ In order for a court to conclude that a subsequent constitutional amendment has partially repealed any portion of the Bill of Rights, there ought to be a clear textual statement to that effect. Failing that, the later enactment should possess an unambiguous core

10. James Madison, *General Defense of the Constitution* (June 12, 1788), reprinted in 11 THE PAPERS OF JAMES MADISON 129, 130 (Robert A. Rutland et al. eds., 1977).

11. See Rubinfeld, *supra* note 3, at 2374-76.

meaning unequivocally dictating such repeal. Nowhere does Hacker confront this problem.

Nor does Hacker confront the genuine threat posed even today by obliterating First Amendment antidisestablishmentarianism. A Congress with the power to dictate rules of religious neutrality for all state and local communities is a Congress empowered to intercede directly into the most private, fundamental domains of religious life. This is what RFRA's supporters never understood. Such a Congress could easily decide that current marriage law is too closely allied with majority religious traditions. Had *Boerne*¹² come out the other way, what would RFRA's supporters have said if Congress later used its expansive Section 5 powers to legislate a Marital Freedom Act, requiring states to permit any person to marry any number of other persons?

Certainly it may be said that the Court's decision in *Boerne* has avoided this result without necessitating any Establishment Clause inquiry. Maybe so. But my essay was written to show that laws like RFRA are unconstitutional period — because they violate the Establishment Clause — no matter how broadly Section 5 or any congressional-power-granting provision of the Constitution is read. Perhaps the "proportionality" test laid out in *Boerne*¹³ will prove elastic. Perhaps a revised RFRA would pass muster under the Commerce Clause.¹⁴ Or perhaps the best reading of Section 5 would give Congress considerable authority to impose on the states duties beyond those judicially deemed to be constitutionally mandated. My point is that whatever the scope of Section 5 — or the commerce clause — may ultimately prove to be *as a general matter*, Congress's power to intervene in *religious matters* is subject to special, independent restrictions. Those restrictions were laid down in the First Amendment, and the Fourteenth Amendment did not repeal them.

Thanks to the Fourteenth Amendment, states can no longer establish religion. But it is a misjudgment to suppose that this guarantee makes First Amendment antidisestablishmentarianism irrelevant. For the antidisestablishmentarian principle never merely prevented Congress from abolishing state laws that were constitutionally deemed, or judicially deemed, to be religious establishments. It prevented Congress from deciding for the nation *what*

12. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

13. *See Boerne*, 117 S. Ct. at 2164, 2169.

14. *See Rubinfeld, supra* note 3, at 2348-49.

state laws excessively favor or disfavor any religion. Despite the Fourteenth Amendment, states must and may deal in all sorts of ways with religion, favoring some religious traditions or disfavoring them, so long as they neither establish nor prohibit free exercise. Current marriage law furnishes an excellent example. State employers making Christmas a holiday supply another. State family law, giving parents the right to inculcate into their children a particular religion, provides yet another. Congress cannot, under the First Amendment, intermeddle with these laws on religious grounds.

Through RFRA, Congress attempted to impose upon all state and local law a national definition of the appropriate terms of religious neutrality. Congress may not pass such a statute without breaching the wall of separation between itself and religion erected by the First Amendment — a wall the Fourteenth Amendment gives us no reason to tear down and every reason to maintain.